IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

WEDNESDAY, THE 4TH APRIL 2007 / 14TH CHAITHRA 1929

SA.No. 550 of 1993(F)

AS.85/1989 of SUB COURT, PAYYANNUR
OS.178/1983 of MUNSIFF COURT, TALIPARAMBA

APPELLANT:PLAINTIFF
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1. PATTATHIL RAGHAVAN NAMBIAR
AGED 65 YEARS, S/O.KANNAN NAMBIAR
RETIRED TEACHER, PATTATHIL HOUSE,
KUTTERI AMSOM, KANHIRANGAD DESOM
TALIPARAMBA TALUK.

BY ADV.SRI.T.A.RAMADASAN

RESPONDENTS/DEFENDANTS
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1. N.SUDHEER, AGED 41 YEARS,
S/O.GOURI AMMA,
KARUMATHUR AMSOM, KANICHAMMAL
DESOM, TALIPARAMBA TALUK.

2. N.SUKHADEV, AGED 39 YEARS
S/O. -DO- HOMEO DOCTOR
KUNNATHUR AMSOM, KANICHAMMAL
DESOM, TALIPARAMBA TALUK.

BY ADV. SRI.V.RAJAGOPAL
SRI.K.N.CHATHUKUTTY

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 4/4 /2007, THE COURT ON 04/04/2007 DELIVERED THE FOLLOWING:

ORDER ON C.M.P.NO.1327/1993 IN S.A.NO.550/1993

4.4.07 DISMISSED SD/- M.Sasidharan Nambiar
Judge

/true copy/

P.S. To Judge

M.SASIDHARAN NAMBIAR,J.

S.A.NO.550 OF 1993

Dated, this the 4th day of April, 2007

JUDGMENT

Appellant is the plaintiff in O.S.178/1983 on the file of Munsiff Court, Taliparamba. Respondents are the defendants. The suit was filed seeking a decree for permanent prohibitory injunction. The plaint schedule property is 40 cents in survey No.36 of kuruvathur village. The case of appellant was that one acre 40 cents in the resurvey number belonged in jenm to Kadamberi devaswom and it was obtained by Kunhikannan Nambiar on leasehold right and while so as per the oral lease appellant obtained one acre 40 cents and has been in possession of the property and while so on the death of Kunhikannan Nambiar, his rights devolved on his widow and children and they assigned their right in favour of the appellant under Ext.B1 assignment deed dated 27.2.1973 and thereafter as per two

assignment deeds appellant sold 50 cents each to AbOObaCker and Aliyar kunhi and another and the remaining 40 cents is the plaint schedule property. It was contended that the jenm right of 40 cents was obtained from the Land Tribunal under Ext.A1 purchase certificate and the tenancy right of appellant over the plaint schedule property was upheld by the Taluk Land Board under Ext.A2 order and respondents have no right over the said property and therefore they are to be restrained by a permanent prohibitory injunction. Respondents in their written statement contended that appellant had right over only one acre transferred under Ext.B1 assignment deed and the plaint schedule property is the remaining property obtained by Kunhikannan Nambiar in the partition and appellant has no manner or right or possession over the same and he is not entitled to the decree for injunction sought for.

2.Learned Munsiff framed the necessary issues. On the evidence of PWs.1 to 3 and DW1

and Exts.A1 to A8 and B1 to B4, upholding the case of the appellant, trial court granted a decree restraining respondents by a permanent prohibitory injunction from trespassing into the plaint schedule property. Respondents challenged the decree and judgment before Sub Court, Payyannur in A.S.85/1989. The first appellate court on reappreciation of evidence found that appellant obtained only one acre and not one acre 40 cents and the southern boundary of Ext.B1 proves that the property assigned under Ext.B1 is only the property to the north of the plaint schedule property and southern property has been in the possession of respondents and appellant did not establish his possession over the property and he is not entitled to the decree for injunction granted by the trial court. The appeal was allowed and the decree granted by the trial court was set aside and the suit was dismissed. Second Appeal was filed challenging the decree passed by the appellate court in

reversal of the decree granted by the trial court.

3. Second Appeal was admitted formulating the following substantial questions of law.

a) In the facts and circumstances of the case was the court below right in reversing the decree of the trial court without a finding how and where the trial court went wrong in its appreciation of evidence oral and documentary?

b) Is the first appellate courts finding that since only one acre is seen assigned as per Ext.B1, plaintiff is not entitled to anything more correct?

c) Is the lower appellate court correct in law in discarding the evidence of possession such as revenue receipts especially when defendants relied only on their superior right?

d) In a suit for prohibitory injunction is it necessary to pray for declaration of possession and putting up a boundary (if boundary is demolished)? Can a suit for prohibitory injunction

be dismissed for not including such a prayer stating that injunction is a discretionary remedy?

e) Has not the court below gone wrong in not considering that plot A is having well defined boundaries on all four sides which is indicative of possession of the same by the plaintiff?

4. Learned counsel appearing for the appellant was heard.

5. Even according to appellant, the plaint schedule property originally belonged to devaswom and was obtained on leasehold right by Kunhikannan Nambiar, the predecessor in interest of respondents 2 to 7. According to appellant, from Kunhikannan Nambiar appellant obtained one acre 40 cents as per an oral lease and has been in possession of the property and while so the rights of legal heirs of Kunhikannan Nambiar were obtained under Ext.B1 assignment deed in 1973 and respondents have no manner of right or possession over the plaint schedule property, which is the remaining property left with the appellant after alienating one acre

by two separate assignment deeds in favour of Aboobacker and Aliyar kunhi and another. Though appellant contended that he obtained an oral lease in 1960, and as per the oral lease, he has been in possession of one acre 40 cents, as rightly found by first appellate court apart from the interested version of the appellant, there is no evidence to substantiate the oral lease. If in fact there was an oral lease in favour of the appellant, in Ext.B1 the existence of an oral lease would have been mentioned. At least it would have been mentioned that the property which was transferred under Ext.B1 was outstanding in the possession of the appellant as per a previous oral lease. As against this Ext.B1 shows that the property was in the possession of the assignors thereunder and possession was transferred to the appellant only under that document. The hollowness of the case of appellant is further fortified by the recitals in Ext.B2 assignment deed executed by the appellant himself whereunder 50 cents of the property

obtained under Ext.B1 was transferred to Alyar kunhi. There is no whisper in Ext.B2 that he was in possession of the property as per an oral lease or by any other arrangement before Ext.B1. Instead the recital was that he obtained possession of the property under Ext.B1, which falsifies the case of oral lease of 1960. Though appellant claim right under Ext.A1 purchase certificate, that order of the Land Tribunal was subsequently set aside by the Appellate Authority, in an appeal filed by the respondents and the O.A. was remanded back to the Land Tribunal and the Land Tribunal thereafter dismissed the same which was challenged before the Appellate Authority (Land Reforms), Kannur. When the appeal was dismissed, that order was also challenged before this Court in C.R.P.3117/00. That C.R.P. was also heard today and it was dismissed as per separate order, rejecting the claim of tenancy raised by the appellant in respect of the plaint schedule property. Though the trial court relied on the property tax receipt and the

report of the Commissioner, the first appellate court on appreciating the evidence found that appellant did not establish his possession of the property. That factual finding cannot be interfered in exercise of the powers of this Court under section 100 of Code of Civil Procedure. When the appellant contended that he has been in possession of the property as per an oral lease, which is found to be false, and it was also found that appellant obtained possession of only the property covered under Ext.B1 which was admittedly alienated by him, case of appellant that he has been in possession of the plaint schedule property can only be rejected, as has been done by the first appellate court. Though reliance was placed on the southern boundary shown in Ext.B2, the self serving recital of the appellant in Ext.B2 cannot be relied on especially when Ext.B2 shows that the right transferred thereunder is the right obtained under Ext.B1 and the property transferred under Ext.B1 is the property

which lies to the north of the property retained by the assignors of the appellant and the property so retained is the plaint schedule property. There is no merit in the appeal. It is dismissed.

M.Sasidharan Nambiar
Judge

Tpl/-